BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The opinion of the District Court for the Eastern District of Pennsylvania, dated February 18, 1941, is found in the record at Pages 80 to 81, being officially reported in 38 F. Supp. 530.

The opinion of the District Court for the Eastern District of Pennsylvania, dated August 21, 1941, is found in the record at Pages 131 to 136, and is not officially reported.

The opinion of the Circuit Court of Appeals for the Third Circuit, dated January 9, 1942, is found in the Record at Pages 142 to 146, being officially reported in 126 Fed. 2nd 134.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is January 9, 1942 (R. 146), the petition for rehearing of which was denied February 10, 1942 (R. 160).

2. The statutory provisions which are believed to sustain the jurisdiction of this Court are Section 240 of the Judicial Code, as amended, 28 U. S. C. A. 347, and Section 721 of the Revised Statutes, 28 U. S. C. A. 725.

3. At the trial without jury, the trial judge admitted certain oral testimony, over exception taken (R. 97-98-108) and motion to strike out, which was denied (R. 118), and over petitioner's request for judgment in favor of peti-

tioner (R. 119), tending to show that the assignment of July 2, 1931, which was absolute and unqualified on its face (R. 88), was collateral, and found that the assignment was intended as collateral security only (R. 133), notwithstanding the fact that the only competent evidence on the subject matter was that the assignment was intended "mostly" as collateral for material respondent would furnish (R. 99) although Bauman Iron Works, assignor, supplied the structural steel work for respondent under a subcontract with the assignee (R. 101). This action of the trial court was made a special point in petitioner's appeal (R. 138) under Civil Procedure Rule 52(b), but the Circuit Court of Appeals for the Third Circuit stated the question required no discussion (R. 143) and decided the appeal to it by following decisions in Pennsylvania which do not control the issue (R. 144), thereby enunciating a principle of law that the absolute assignee of a written contract can thereby acquire the benefits of the contract and avoid the obligations and responsibilities of the contract assigned, by oral testimony which of itself is insufficient, in a suit between the assignee and assignor, to vary the contract, a point expressly raised by petitioner on appeal to such court (R. 138-139).

The decision of the Circuit Court of Appeals for the Third Circuit, sustaining the rulings of the trial court on the vital question of Pennsylvania law before it, decides an important question of local law in a way probably in conflict with applicable local decisions, and warrants this Court, in the exercise of its sound discretion under the Judicial Code, Section 240 as amended, 28 U. S. C. A. 347, the allowance of a writ of certiorari to issue to the said Circuit Court of Appeals for the Third Circuit, in this case.

4. The cases believed to sustain the jurisdiction of this Court to review the decision of the Circuit Court of Appeals for the Third Circuit, believed to have misapplied Pennsylvania law, are the following:

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188;
Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290;
Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481;
Fidelity Union Tr. Co. v. Field, 311 U. S. 169, 85 L. Ed. 109;
West et al v. Am. Tel. & Tel. Co., 311 U. S. 223, 85 L. Ed. 139;
Stoner v. N. Y. Life Ins. Co., 311 U. S. 464, 85 L. Ed. 284;
Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 85 L. Ed. 327.

III.

Statement of the Case.

This has already been stated in the preceding petition under I, which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals for the Third Circuit erred in failing to apply the law of Pennsylvania as expounded by the Supreme Court of Pennsylvania in more recent cases than the authorities relied upon in its opinion. The authorities relied upon by the said Circuit Court, while a correct expression of the law of Pennsylvania where suit is between two parties to an agreement and it is admitted

by both litigants that the writing does not embody the entire agreement, or where fraud, accident, or mistake is averred and proved, are inapplicable where there is no admission, no averment nor proof of fraud, accident, or mistake and, as in the present case, the suit is between a third person and one of the original parties to the agreement.

2. The Circuit Court of Appeals for the Third Circuit erred in disregarding the three reasons assigned by the petitioner for reversing the judgment of the trial court, each of which reasons, it is believed, would have been controlling in behalf of the petitioner, they briefly being:

A—The respondent assumed the duties of the assignor, including the contract obligation to pay subcontractors, among whom was plaintiff.

B—In the absence of averment and proof of fraud, accident, or mistake, no contemporaneous oral agreement contrary to the unconditional obligation of the written assignment is admissible under the law of Pennsylvania, if the effect thereof is to destroy rights in the contract assigned acquired by petitioner.

C—Where the express terms of an assigned written contract created legal duties to and rights in petitioner, such rights are indefeasible, and can be satisfied only by full performance of the obligation by the assignor or assignee. Parol evidence of a prior parol agreement between assignor and assignee, which, if believed, has the effect of destroying petitioner's rights without his knowledge or consent, is inadmissible under the law of Pennsylvania.

3. The Circuit Court of Appeals for the Third Circuit erred in failing to consider that:

A—The law of Pennsylvania requires clear, precise and indubitable evidence to vary the absolute terms and obligations of a writing. The only competent evidence in the present case that the assignment to the respondent was for collateral purposes is a statement by respondent's witness, excepted to, that the assignment "was mostly collateral for material they would furnish" (R. 99). Such evidence is not clear, precise, or indubitable and the finding of the trial court that it was is clearly erroneous.

B—Respondent's own evidence (R. 101)

> "Q. In other words, Bauman Iron Works supplied the structural steel work for Lehigh under the subcontract with Lehigh, is that correct?
> A. Yes."

proves that respondent became absolute owner of the assigned contract as respondent in turn subcontracted its own work back to its assignor.

C—Any agreement terminating petitioner's rights in the McCloskey assigned contract must necessarily have been made, under the facts of the present case, by McCloskey and respondent. There is no evidence of such an agreement present in this case.

4. The Circuit Court of Appeals for the Third Circuit erred in failing to consider that the petitioner, on July 2, 1931, at the time of the assignment of the McCloskey-Bauman contract to respondent was a donee beneficiary and not a creditor beneficiary of the contract because, although the McCloskey-Bauman contract was entered into May 8, 1931 (R. 85), and the petitioner's contract with Bauman was entered into May 27, 1931 (R. 86), it was not until November 24, 1931, that petitioner began deliveries of its

material to the construction project (R. 86) at a time when respondent had received $179,234.95 (R. 91-92) on the structural steel contract price of $179,500. (R. 85-86.)

5. The Circuit Court of Appeals for the Third Circuit erred when it stated in its opinion (R. 145):

> "It appears, also, in the evidence, that this very Bauman-McCloskey contract was, itself, assigned to this plaintiff on January 28, 1933 . . ."

Actually, the assignment (R. 106-107) was of

> ". . . all moneys remaining due upon . . . the contract from McCloskey & Company, Inc., to Bauman Iron Works, Inc., as collateral security . . ."

and was not an assignment of the contract itself, and occurred prior to February 2, 1933, at a time when the contract was, by respondent's evidence, still in the sole control of respondent. (R. 116.)

V.
Argument.

Summary of Argument.

Point A. The obligation laid on respondent, as assignee of Bauman's contract with McCloskey, to pay petitioner for materials furnished in completing the work undertaken by respondent, in compliance with the terms of the assignment, could not be defeated by parol proof of any contrary understanding to which petitioner was not a party.

Point B. The evidence relied upon by the trial court to permit a variance of the absolute obligation of the assignment was insufficient because not clear, precise, or indubitable, as required by the law of Pennsylvania.

Point A.

The obligation laid on Lehigh, as assignee of Bauman's contract with McCloskey, to pay Art Metal for the materials furnished in the completion of the work undertaken by Lehigh, in compliance with the terms of the assignment, could not be defeated by parol proof of any contrary understanding to which Art Metal was not a party.

The judgment recently pronounced by the Third Circuit, in this case, that the respondent as assignee of the contract must be taken to have assumed all of the duties of the assignor under the assigned contract, including the obligation to pay petitioner and that there appears no impediment in the law of Pennsylvania to allowing recovery by a third party beneficiary, 116 Fed. 2nd. 57 at 59, was set at naught by the trial court on a finding, affirmed by the Third Circuit, predicated of parol testimony, that

the assignment of July 2, 1931 (R. 88) though absolute and qualified in its terms as a transfer to the assignee of the assigned contract, was intended to serve only as collateral security for the payment of the assignor's indebtedness, and was, therefore, ineffectual to charge the assignee with any obligation to petitioner.

We submit (1) that the obligation imported by the written instrument could not be evaded by parol proof of a condition at variance with its unqualified terms; (2) that the testimony adduced by the defendant fell far short of warranting an inference of any intent to confine the purposes to be served by the assignment to affording security to Lehigh; and (3) that in any case the security to be afforded Lehigh could be no more than a right in Lehigh to the proceeds of its collections from McCloskey, under the latter's contract with Bauman, after payment of the bills for labor and materials incurred in its prosecution of the work, the performance of which by Lehigh was the plainly expressed consideration for Bauman's assignment of the contract.

On the first proposition, the controlling principle of the law of Pennsylvania today is the following:

> "Any parol agreement that subjects the obligation on the instrument to any condition or contingency, whether in person, time, or amount, is ineffective, and the instrument is unconditional, unless fraud, accident or mistake was the means through which it was procured."
>
> *Speier v. Michelson,* 303 Pa. 66 at 72, 154 A. 127.

This principle of *Speier v. Michelson* has been approved by the Superme Court of Pennsylvania in suits involving a variety of writings:

1. Notes—

Tomlinson v. Wilson, 310 Pa. 41; 164 A. 721.
Rosenblum & Co. v. Rosenblum, 313 Pa. 49; 169 A. 79.
Waber's Estate, 317 Pa. 497; 177 A. 51.
Third Natl. Bank etc. v. Rodgers, 330 Pa. 523; 198 A. 320.
Lycoming Tr. Co. v. Smithgall, 334 Pa. 4; 5 Atl. 2nd. 152.
Natl. Bank Fayette Co. v. Valentich, 343 Pa. 132; 22 A. 2nd. 724.

2. Contracts—

Russell v. Sickles et al., 306 Pa. 586; 160 A. 610.
Madison Kipp v. Price Battery Co., 311 Pa. 22; 166 A. 377.
Germantown Tr. Co. v. Emhardt, 321 Pa. 561; 184 A. 457.
Dahath Elec. Co. v. Suburban Elec. Co., 332 Pa. 129; 2 Atl. 2nd 765.
Penna. Co. etc. v. Lebanon B. & L., 337 Pa. 316; 10 A. 2nd 418.

3. Trade acceptances—

Architectural Tile Co. v. McSorley, 311 Pa. 299; 166 A. 913.

4. Mortgages—

Peoples Pgh. Tr. Co. v. Dunn Home Site Co., 311 Pa. 315; 166 A. 844.

5. Assignments—

Gill's Estate, 314 Pa. 558; 171 A. 457.

In the instant case there was, of course, no suggestion of the omission of the alleged parol understanding by rea-

son of any fraud, accident or mistake, and if, therefore, the character of the instrument will not be ignored but will be given its normal effect (Speier v. Michelson, supra, at page 71), the action of the trial court, affirmed by the Third Circuit, rendering the obligation of the assignment nugatory as to the matters in controversy was clearly without legal justification.

The right to be conserved in this case is that of the petitioner at the time of the assignment of July 2, 1931, (R. 88) on which date, petitioner was a donee beneficiary of the Bauman-McCloskey subcontract (R. 68) and also a donee beneficiary of respondent's implied promise to pay petitioner, no deliveries of petitioner's materials in relief of respondent's obligation to perform the assigned contract being made to the construction project until November 24, 1931 (R. 86). That right is indefeasible without the consent of the beneficiary and no agreement merged in the written instrument can destroy it, the petitioner's right to enforce the obligation being unqualified. See *Logan v. Glass*, 136 Pa. Superior 221 at 226-227, 7 Atl. 2nd 116; *Philipsborn v. 17th & Chestnut Sts. Holding Corp.*, 111 Pa. Superior Ct. 9, 169 A. 473; *Commonwealth v. Great American Indemnity Co.*, 312 Pa. 183; 167 A. 793.

It may be of interest to note, in passing, that precisely the same thought was expressed more than a century ago, in *Heilner v. Imbrie*, 6 S. & R. 401 (Pa.) at 411, (no Atlantic report) where the court stated:

> ". . . but distinct from the general principles of the admission of such testimony between the parties, parol evidence never can be received to vary a written agreement, even though a clear mistake was proved, or a departure from written instructions to affect the inter-

est of third persons, uninformed of the facts, and who have, bona fide, and for a valuable consideration acquired rights under it."

This case was followed by the Superior Court of Pennsylvania in *Yoder et al. v. Swainbank*, 82 Pa. Super. 568 (1924). (No Atlantic citation.)

Point B.

The evidence relied upon by the trial court to permit a variance of the absolute obligation of the assignment was insufficient because not clear, precise and indubitable, as required by the law of Pennsylvania.

We submit that the testimony adduced by the respondent fell far short of warranting an inference of any intent to confine the purposes to be served by the assignment to affording security to the respondent.

The only competent testimony was that of Benham, the Treasurer of Bauman, who, when asked what was said at the time the assignment was executed by Kift, who was President of Bauman and Treasurer of respondent, replied (R. 99):

> "A. The payments on account were to protect the account, and it was *mostly collateral* for material they would furnish."

It will be noted that Mr. Benham carefully refrained from asserting that the *sole* purpose of the assignment was to give security to Lehigh. Such testimony fails to meet the test required by the Pennsylvania decisions, as to the quality of evidence needed to vary the terms of a written instrument. A case stating such test is *Pender v. Cook*, 300 Pa. 468 at 473, 150 A. 892, as follows:

". . . the evidence must be clear, precise and indubitable, established by two witnesses, or by one witness and corroborating circumstances."

The words "clear, precise and indubitable" have been clearly defined as to meaning many times. One of the earlier cases is *Spencer v. Colt*, 89 Pa. 314 (No Atlantic citation). Another landmark case is *Ralston v. Phila. R. T. Co.*, 267 Pa. 257; 110 A. 329, and one of the more recent cases is *Aliquippa Natl. Bank v. Harvey*, 340 Pa. 223; 16 A. 2nd 409.

Nowhere in the trial record will there be found the slightest suggestion of any negation or disclaimer on the part of respondent of the obligation to materialmen with which it became bound when it stepped into Bauman's shoes, and in plain and unmistakable terms undertook to complete the work comprehended in Bauman's agreement with McCloskey.

It is significant to note, likewise, from the testimony of the same witness (R. 101) that Bauman itself afterwards became a subcontractor under respondent for the structural steel that had originally been contracted to be done by respondent for the assignor (R. 85-86).

Nevertheless, it is on this fragment of vague and inconclusive testimony, vainly sought to be bolstered by the equally equivocal testimony of the witness, Anna Ritter, (R. 112) that Kift told her that the assignment was made "in order that Lehigh Structural Steel Company could be protected for payments", that the court below rests its finding that the assignment was intended merely as security for the payment of a debt, and that neither party intended or agreed that Lehigh should assume Bauman's obligation to pay Art Metal. (R. 133.)

We submit that the slightest regard for the familiar principle that exacts clear, precise and indubitable testimony to accomplish the reformation of a written instrument must have impelled a contrary conclusion, regardless of any consideration of the admissibility of the testimony in the first instance.

In the opinion of the court below (R. 133), it is asserted that there is no question here of reforming a written instrument, and, hence, that the rule is inapplicable. With all deference to the learned writer of the opinion, we submit that when the result attained is the complete nullification of the obligation implicit in the written instrument, no more drastic reformation of it can ensue, and, conversely, no more stringent need arise for the submission, if by parol, of clear, convincing and indubitable proof in derogation of the expressed understanding.

The reasoning of the opinion seems to assume the necessity for an expressed intent on the part of Lehigh to undertake the payment of the materialmen's bills, before it could be held to the discharge of the obligation. Obviously, however, since the liability was created by operation of law, immediately on Lehigh's acceptance of the assignment, there could be no such necessity, and the liability could not be evaded except, perhaps, by a clearly expressed disclaimer on the part of Lehigh to be so bound, and of which there is, of course, not the faintest suggestion in the testimnoy.

Apparently it has been the failure to apprehend the full measure of the obligation thrust by law upon Lehigh, as assignee of Bauman's contract with McCloskey, that has made for some confusion of thought in attaching undue significance to a phase of the dealings between Bauman and

Lehigh that is essentially without relevancy in the determination of this issue.

The evident concern of Lehigh to be assured payment for the work that it had agreed to perform, doubtless prompted its acquisition of the contract from Bauman, with the consequent security afforded by the payment into its own hands of the monies to come due from McCloskey. But Art Metal was not in any sense concerned in the terms of the ultimate reckoning between Lehigh and Bauman, nor with the considerations, equitable or otherwise, by which it might be controlled. Granted, arguendo, that Lehigh's right to the balance remaining on completion was not, qua Bauman, absolute and unqualified, patently, nevertheless, no balance could be struck until the cost of the work had been defrayed and the bills of the subcontractors and materialmen under Lehigh met and fully paid.

In a word, the court below and the Third Circuit fail to distinguish between a mere assignment of monies to come due under a contract, and the assignment of the contract itself, entailing burdens that perforce must be borne and discharged by an assignee, before any duty to account to the assignor can arise. Until that has been accomplished, Lehigh will not have acquitted itself of the responsibility that it assumed toward them in plain and unmistakable terms.

The Equities are Preponderantly with the Plaintiffs.

In the concluding paragraph of his opinion, the learned Trial Judge remarks (R. 134):

> "• • • I would be very reluctant to reach the conclusion which I have if any injustice to Art Metal, or fraud upon its rights, were involved. Such is not the fact."

On the contrary, we submit that the complete antithesis of this conclusion is readily demonstrable.

Lehigh's contract with Bauman, antedating the assignment, for the fabrication and erection of the structural steel, established the price to be paid to Lehigh at $179,500.00 (R. 85). Lehigh collected from McCloskey $208,528.49, and from Bauman, subsequent to the execution of the assignment, $18,136.16—in all $226,664.65,—(R. 86), or $47,164.65 in excess of the contract price.

The balance due Art Metal on the completion of its work, on December 3, 1932, was $17,775.70 (R. 87). Lehigh was thus in a position to have liquidated the liability in full, without any impairment of its own status. Instead it paid the overplus to Bauman, presumably with full knowledge of the unsatisfied obligation to Art Metal, for it will be remembered that Kift was Treasurer and a large stockholder of Lehigh, and also President of Bauman, all of the stock of which he held in some form of trust, the terms of which were undisclosed.

To be sure, as the Trial Judge remarks (R. 134), Art Metal had the added security of the bond that accompanied McCloskey's contract with the County (R. 84). But, certainly, a resort to the bond must have been attended by precisely the same consequence as is sought in this suit, since, obviously Lehigh's collections from McCloskey would thereupon have decreased in an amount commensurate with the latter's enforced payments to Art Metal in discharge of the obligation of the bond.

It is equally true that had not Art Metal performed its contract, Lehigh's outlays must have been so increased or its recoveries from McCloskey so diminished, that on the final reckoning, its account would have stood precisely as it would have been had it paid Art Metal. Put in other words,

Lehigh unquestionably became the beneficiary of Art Metal's performance and in equity and good conscience should not shirk the recognition of a liability to answer therefor.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by the Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing such decision of the Third Circuit.

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